ORIGINS OF THE RIGHT TO PRIVACY

Excerpt from Shepard & Dunston, Workplace Privacy (BNA) (1987)

While legislators, judges, and philosophers seldom agree on what "privacy" is or which privacy interests are entitled to protection from intrusion by government or other people, it is universally accepted in the United States that, as stated in the Declaration of Independence, individuals have certain "inalienable" rights. The right to privacy is often considered by commentators to be one of those rights.[1]

The main task confronting employers and employees is determining which privacy rights have been recognized and protected, and how they apply in the workplace. An analysis of workplace privacy rights must begin with a review of the major sources of these rights: common law torts, which limit the acts one person can commit against another; the U.S. Constitution, which limits government activities; and state constitutions and laws, which provide additional rights and protections against specific intrusions into personal privacy.

COMMON LAW RECOGNITION OF PRIVACY RIGHTS

Prior to 1890, no English or American court had ever expressly granted relief based on an individual's right of privacy, although Judge Cooley, an authority on the law of torts, had used the phrase "the right to be let alone" in his treatise.[2] In 1890, attorneys Samuel D. Warren and Louis D. Brandeis published a landmark article in the *Harvard Law Review* entitled "The Right To Privacy," in which they argued that implicit in a number of common law cases dealing with defamation and property rights was a broader principle — the right to privacy — that should receive separate recognition as a distinct tort action. They stressed that the press was overstepping the bounds of propriety and decency and that "while solitude and privacy has become more essential to the individual; . . . modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."[3]

While for many years legal authorities and the various states could not agree on whether a separate privacy tort should be recognized, some form the tort has now been accepted by the courts or established by legislation in every state.[4] In a 1960 article explaining how the right to privacy had evolved in the states, professor William Prosser maintained that the right comprises four torts rather than one:

> "The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except

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that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone'."[5]

Prosser identified these four privacy torts as: (1) appropriation of the name and likeness of another; (2) unreasonable intrusion upon the seclusion of another; (3) unreasonable publicity given to another person's private life; and (4) publicity that unreasonably places a person in a false light before the public. Any person who commits one of these torts may be held liable to the injured person for compensatory and possibly punitive damages.[6] This four-part analysis of the right to privacy was adopted by the *Restatement (Second) of Torts* in 1977, and it has become accepted by nearly all courts. Several states have adopted this description of the right of privacy by law.[7] Each of these four privacy torts has been applied in the workplace context.

Appropriation

The oldest recognized privacy right prohibits the appropriation of other individuals' names or likenesses, without their permission, for commercial use.[8] This tort protects individuals' property interest and their personal interest in not having their names or faces used by others. Sometimes called the "right of publicity," the tort of appropriation has been cited by employees after their company has used photographs of them to advertise its products. The protection against appropriation is firmly established today and is seldom considered novel or controversial.

Intrusion

The rule against intrusion generally states that anyone who intentionally intrudes upon the solitude or seclusion of another person or upon his or her private affairs or concerns is subject to liability if the intrusion would be highly offensive to a reasonable person.[9] The intrusion can be physical, such as breaking into a person's home, but the principle extends to wiretapping private conversations or looking into the windows of a person's home. The intrusion may also comprise some other form of investigation or examination of individuals' private concerns, such as opening their mail or searching their safes or wallets.[10] The place, item, or thing intruded upon must be private and entitled to privacy. For example, it has been argued that no "right to be let alone" exists on a public street, and therefore it is not an invasion of privacy to follow and watch a person in public.[11]

The intrusion tort is based on the psychological distress caused by the intrusion itself. The defendant need not have learned anything private or embarrassing about the plaintiff, or wrongfully disclosed any such information. In the workplace, intrusion suits have been brought as a result of an employer's surveillance or investigation of its employees,[12] searches of an employee's personal belongings contrary to the employer's policies and

practices,[13] and when employers have acted on the basis of an employee's private affairs, such as firing someone for socializing with or dating employees of a competitor.[14]

Public Disclosure of Private Facts

This tort prohibits making public matters in the private life of a person if the publicity is highly offensive to a reasonable person and is not of legitimate concern to the public. Liability can be imposed even if the information is true and the plaintiff could not sue for defamation.[15] This tort focuses on publicity given to private facts about individuals. "Publicity" in this context means that the matter is made public by communicating it to a large number of people. Usually it is not an invasion of privacy to communicate a fact about the plaintiff's private life to one person or to a small group of people, but the same statement made in an address to a large audience can be sufficient to establish privacy invasion.[16] For example, it can be an invasion of individuals' rights to publish in a newspaper that they do not pay their debts, but it is not an invasion of privacy to communicate that same information to their employers.[17]

For invasion of privacy to occur, the facts that are made public must be private ones. Examples include sexual relations, family quarrels, personal illnesses that carry negative connotations, and other intimate details of an individual's life. In the workplace, employees have brought cases after their supervisors disclosed, without their knowledge or permission, that they had AIDS or that they had received psychiatric treatment. The outcome of these cases sometimes depends on the extent of the publicity and the state where the claim is filed.[18]

False Light

The "false light" tort involves publicity that places the plaintiff in a false light in the public eye. It requires a showing that the false light in which the individual is placed would be highly offensive to a reasonable person.[19] The tort is similar in many respects to defamation, but it does not require that the plaintiff be defamed. The classic example of this tort was a suit by Lord Byron to enjoin the circulation of a bad poem that had been attributed to him.[20] Another example would be a published photograph that depicts a group of wildcat strikers, but includes a person who was merely passing by when the picture was taken.[21] In the workplace context, false light claims have been brought in conjunction with defamation claims by employees who felt they had been wrongfully accused of dishonesty or other misconduct.[22]

Defenses Against Privacy Invasion Claims

Warren and Brandeis argued in their article that any action that would be privileged under the law of defamation should also be privileged under

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the law of privacy.[23] The law of defamation recognizes a qualified privilege when a statement is made in good faith about a subject in which the person communicating it has an interest, and the communication is made to a person who has a corresponding interest. This privilege can apply to employer communications.[24] The qualified privilege of employers to protect or further their own legitimate interests has been cited in privacy case rulings that have upheld employers' rights to monitor workers' phone calls and conduct time and motion studies of employees.[25] The employer communication privilege has eroded in some jurisdictions in recent years, as juries have increasingly found that employers have waived the privilege because they acted with malice.

PRIVACY RIGHTS UNDER THE U.S. CONSTITUTION

Griswold and Its Progeny

The U.S. Constitution does not contain language expressly providing a right to privacy. In 1928, Justice Brandeis, co-author of the 1890 privacy article, wrote in a dissenting opinion in *Olmstead v. United States*[26] that the Fourth Amendment protection against unreasonable searches and seizures extends beyond physical invasions of protected space to include "the right to be let alone." Later U.S. Supreme Court rulings recognized a number of specific constitutional rights relating to personal privacy. But it was not until the 1965 *Griswold* decision,[27] a case involving married couples' access to contraceptives, that the Court ruled that an implied privacy right exists within the "penumbras" of guarantees in the Constitution's Bill of Rights. This constitutional right to privacy has been developed through subsequent case law and, although the scope of the right is not well-defined, its existence is recognized.

Justice Douglas' majority opinion in *Griswold* relied on several cases which suggested that the specific guarantees in the Bill of Rights create "zones of privacy." For example, neither the Constitution nor the Bill of Rights mention the freedom to associate with other people. The right to have children educated at schools of their parents' choice — whether public, private, or parochial — is also not mentioned, nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include these rights.[28] *Pierce v. Society of Sisters*[29] upheld parents' right to educate their children as they choose, and *Meyer v. Nebraska*[30] recognized the right to study the German language in a private school. In each of these cases, the Court ruled that the First Amendment prohibits the state from contracting the spectrum of available knowledge. Similarly, the Court has protected the "freedom to associate and privacy in one's associations," as a peripheral First Amendment right.[31]

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Justice Douglas noted that other constitutional guarantees, like those in the First Amendment, had been recognized as protecting the "zones of privacy." The Fourth Amendment affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment's Self-Incrimination Clause enables citizens to create a zone of privacy that government may not force them to surrender to their detriment. The Fourth and Fifth Amendments have been described as providing protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."[32] In *Mapp v. Ohio*, the Court said the Fourth Amendment creates a "right to privacy, no less important than any other right carefully and particularly reserved to the people."[33]

After reviewing these decisions, Justice Douglas concluded in *Griswold* that "[t]hese cases bear witness that the right of privacy which presses for recognition here is a legitimate one."[34] The Court found that the concerns of the marital relationship are within the zone of privacy created by several fundamental constitutional guarantees, and that a state, by forbidding the use of contraceptives, impermissibly intruded on that relationship.

Since *Griswold*, the Court frequently has been presented with cases that seek to define and expand the right of privacy. The most important cases have been in the area of personal relationships and procreation. Justice William Brennan's majority opinion in *Eisenstadt v. Baird*,[35] one of several cases that struck down limits on access to contraceptives, observed that if "the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[36]

The Court also has recognized and expanded the right of privacy in other areas. *Whalen v. Roe*[37] involved a New York statutory scheme for maintaining computerized records of prescriptions for certain dangerous drugs. Although it upheld the state law, Justice John Paul Stevens' majority opinion recognized that the right to privacy includes more than the specific rights discussed above. Stevens wrote that the right encompasses both the "individual interest in avoiding disclosure of personal matters" and the "interest in independence in making certain kinds of important decisions."[38]

The constitutional privacy protections that arise from *Griswold* apply to the actions of the federal government and the states, and therefore they cover all public employees. With some limited exceptions, they do not restrict private employers. Absent specific state or federal legislation, only the common law torts such as "invasion of privacy" and "defamation" define the privacy rights of private employees. Nevertheless, the protections afforded public employees are important to private employees because many courts and arbitrators look at constitutional protections for guidance on the type of privacy interests that deserve protection. They

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often incorporate these concepts, by analogy, in cases involving workplace disputes brought under other theories, such as wrongful discharge.

The Supreme Court has confronted the issue of privacy in the workplace in cases involving search and seizure. The Court has recognized, in the context of criminal litigation, that employees may sometimes have a reasonable expectation of privacy in the workplace. In *Mancusi v. De Forte*,[39] the Court concluded that a union official had a personal right under the Fourth Amendment to object to an allegedly unreasonable search and seizure by police of union records from a union office the plaintiff shared with other union officials. The Court found that the union official, who spent considerable time in the office, had custody of records at the time of the seizure and could reasonably have expected that such records would not be touched except with the permission of other union officials. In another criminal case, *Oliver v. United States*,[40] where the Court found no legitimate expectation of privacy in open fields such as farms or park land, it noted in a footnote that legitimate expectations of privacy may exist in offices and commercial buildings.

These cases foreshadowed an extension of the right to privacy into the workplace, if public employees have a reasonable expectation of protection against searches of desks, lockers, and personal belongings. The extent to which the Fourth Amendment provides a right to privacy in the workplace was presented to the Court this year in *O'Connor v. Ortega*.[41]

O'Connor v. Ortega: Workplace Privacy 1987

The Supreme Court addressed in *Ortega* the issue of whether the search of a state employee's desk, without prior notification or his approval, constituted an unreasonable search and seizure in violation of the employee's reasonable expectation of privacy in the workplace. This case is the first civil action of this kind to reach the Court.

Magno Ortega, a psychiatrist, was an employee of a state hospital in California. He had primary responsibility for training physicians in the psychiatric residency program, and had been employed by the hospital for 17 years. Hospital officials became concerned about possible improprieties in Ortega's management of the residency program, particularly his acquisition of a computer that may have been paid for with coerced contributions, plus charges that he had sexually harassed female hospital employees and had taken inappropriate disciplinary action against a resident.

While Ortega was on administrative leave pending investigation of the charges, hospital officials, allegedly to take inventory and secure state property, searched Ortega's office and seized several personal items from his desk and file cabinets — a Valentine's Day card, photographs, and a book of poetry from a former resident — that were used in administrative proceedings that led to his dismissal. No formal inventory of the property was ever made, and the other papers in the office were placed in boxes for storage. Ortega filed an action against the hospital officials alleging that the search of his office violated the Fourth Amendment.[42]

The Court addressed two issues: whether Ortega, as a public employee, had a reasonable expectation of privacy in his office, desk, and file cabinets at his place of work, and if so, whether the search was reasonable under the Fourth Amendment.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."[43] The amendment applies, through the due process clause of the Fourteenth Amendment, to the conduct of state and local government officials, including searches and seizures by government employees or supervisors of the private property of their employees. Previous decisions established that Fourth Amendment rights are implied only if the conduct of the governmental officials infringes on "an expectation of privacy that society is prepared to consider reasonable."[44] Several factors are used to determine what expectations are considered reasonable, including the intent of those who wrote the Fourth Amendment, the uses to which the individual has put a location, and societal understanding that certain areas deserve protection from the government.[45]

Drawing on *Oliver* and other decisions, the Court held that public employees may have a reasonable expectation of privacy against intrusions in the workplace. As with the expectation of privacy in the home, this expectation of privacy in the workplace is "based upon societal expectations that have deep roots in the history of the Amendment." The Court concluded that public employees *may* have the same reasonable expectations of privacy in their workplaces as private sector employees.

The Court, noting the wide variety of public sector work environments, held that the reasonableness of an expectation of privacy must be decided on a case-by-case basis. For example, the Court observed that an office is seldom a private enclave free from entry by others. It is the nature of government offices that many people — fellow employees, supervisors, visitors, and the general public — may have frequent access to an individual's office. While "constitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer,"[46] some government offices may be so open to fellow employees or to the public that no expectation of privacy is reasonable.

The undisputed evidence disclosed that Ortega did not share his desk or file cabinets with any other employees. Ortega had occupied the office for 17 years and he kept many materials in his office, including personal correspondence, medical files, correspondence from private patients not connected to the hospital, personal financial records, teaching aids and notes, and personal gifts and mementos. The files on physicians in residency training were kept outside Ortega's office. On the the basis of this evidence, the Court agreed that Ortega had a reasonable expectation

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of privacy in his desk and file cabinets. Five justices also agreed that Ortega had a reasonable expectation of privacy in his office.

The Court then considered whether the search was reasonable under the Fourth Amendment. What is reasonable depends on the context within which a search is conducted.[47] The standard of reasonableness applicable to different types of searches involves "balancing the nature and quality of the intrusion against the important governmental interest alleged to justify the intrusion."[48] In the case of searches conducted by a public employer, courts must balance the invasion of employees' legitimate expectations of privacy against the government's need for supervision, control, and efficient operation of the workplace.

The Court found little case law on the appropriate standard of reasonableness for a public employer's work-related search of its employees' offices, desks, or file cabinets. The lower courts that had addressed this issue had generally ruled that any search by an employer satisfies the Fourth Amendment reasonableness requirement if it is "work-related."[49] Recognizing that the legitimate privacy interests of public employees in the private objects they bring into the workplace may be substantial, the Court balanced the realities of the workplace and rejected the idea that officials be required to obtain a warrant before they conduct a search. In the Court's view, requiring employers to obtain warrants when they want to enter an employee's office, desk, or file cabinet for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome.

The Court also considered whether public employers must have probable cause to believe a crime has been committed before searching their employees' offices. Although it recognized that searches usually must be based on probable cause, the Court held in *Ortega* that a probable cause requirement would cause intolerable burdens for public employers confronted with a need to correct employee misconduct or incompetence.[50] The Court concluded that for legitimate, work-related, non-investigatory intrusions as well as investigations of work-related misconduct, a standard of reasonableness should be applied. This standard, the Court held, would neither unduly burden the efforts of government employers to ensure the efficient and proper operation of the workplace nor authorize arbitrary intrusion into the privacy of public employees.

The standard adopted in *Ortega* means that a search of an employee's office must be "justified at its inception" by the fact that reasonable grounds exist for suspecting that the employee is guilty of work-related misconduct, or because it is necessary for another work-related purpose, such as retrieving a file. The search also must not be excessively intrusive, and the methods used must relate to the objective of the search. The Court remanded *Ortega* so the lower court could apply these standards.

Justice Antonin Scalia concurred in the reversal, but favored a more explicit holding in favor of the employer. He suggested that the reasonableness standard established by a plurality of the justices is "so devoid of content that it produces rather than eliminates uncertainty in this field." Endorsing a supervisor's unrestricted right of access, Justice Scalia suggested that Fourth Amendment protections are limited in light of the government's "special" needs:

> [T]he government, like any other employer, needs frequent and convenient access to its desks, files, and offices for work-related purposes. I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules–searches of the sort that are regarded as reasonable and normal in the private employer context–do not violate the Fourth Amendment.[51]

The balance struck in *Ortega* will have a significant impact on the development of privacy rights in the workplace. The Court's recognition that the government, in its role of an employer, may conduct certain activities that it could not do with other citizens provides a victory for employers, and *Ortega* already is being cited in cases involving drug testing of employees. At the same time, the Court's statement that employees may have a legitimate expectation of privacy in the workplace, although it applies only to searches under the Fourth Amendment, sets the stage for future litigation over employee privacy rights.

State Constitutional Provisions and Laws Affecting Privacy

Most state constitutions have provisions similar to the Fourth Amendment of the U.S. Constitution. These amendments, which are often cited in workplace search or testing cases, have sometimes been interpreted more liberally than the Fourth Amendment.[52] Several states also have constitutional provisions specifically recognizing and protecting the right of privacy. Article 1, Section 22 of the Alaska Constitution, for example, states: "[t]he right of the people to privacy is recognized and shall not be infringed."[53]

Some of these provisions apply only to the government. Florida's constitution provides that:

> Every natural person has the right to be left alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.[54]

Other provisions are more general. The California Constitution recognizes that:

> [a]ll people are by nature free and independent and have inalienable rights. Among those are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy.[55]

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This clause has been interpreted to apply to both public and private employers.[36] Although no direct right of action exists for violations of the provisions, an employee might be able to use them as an example of public policy that should be enforced through the law, such as an action for wrongful discharge.

Ten states include some form of privacy guarantee in their constitutions.[37] Where these provisions extend to private employers, employees have an additional tool to challenge invasions of privacy. Where the provisions apply only to public employees, they may be used to demonstrate the "public policy" importance of the right to privacy.

The states are also at the forefront in protecting workplace privacy through specific legislation. Where common law torts are not applicable, private employees often have few remedies in privacy disputes with their employers, except through legislative initiatives. As a result, recognition of employee rights in areas such as polygraph tests and other privacy issues have more often come through legislation than litigation. The development of state privacy laws has varied among the states, but it is likely to increase as workplace privacy issues proliferate.

Footnotes

[1] Tribe, *American Constitutional Law* (New York: The Foundation Press, Inc.) 1978 § 15-3.

[2] W. Prosser, *Law of Torts*, § 117, at 802 (4th ed. 1971), citing Cooley, *Torts*, at 29 (2d ed. 1888)(herein Prosser).

[3] Warren and Brandeis, "The Right To Privacy," 4 *Harv. L. Rev.* 193, 196 (1890).

[4] States that have recognized the right of privacy by statute include New York, McKinney's Consol. Laws of New York, Civil Rts. § 51 (West 1976), Oklahoma (Okla. Stat. Ann. tit. 21, § 839 (West 1982)), Utah (Utah Code Ann. § 49-3-1 (Allen Smith 1982)), and Virginia (Va. Code Ann. § 18.2-216.1 (Michie 1982)).

[5] W. Prosser, "Privacy," 48 Calif. L. Rev. 383, 389 (1960). A version of this article appears in Chapter 20 of Prosser's treatise, *Law of Torts*.

[6] The first tort to be recognized, appropriation of the plaintiff's name or likeness for the defendant's benefit, has rarely been used in disputes between employers and employees. See *Restatement (Second) of Torts* § 652C for a description of this action.

[7] J. Thomas McCarthy, *The Rights of Publicity and Privacy*, (New York: Clark Boardman Company, Ltd.) 1987 § 1.5. See, e.g., R.I. Gen. Laws § 9-1-28.1 (1980).

[8] See *Restatement (Second) of Torts* § 652C (1977).

[9] See *Restatement (Second) of Torts* § 652B (1977).

[10] *Restatement (Second) of Torts* § 652D, comment d (1977); Prosser, § 117 at 807-808.

[11] W. Prosser, *Law of Torts* § 117 at 808; Cf. *Prosser and Keeton on Torts*, 5th ed., (West 1984), § 117 at 855-56.

[12] *Pemberton v. Bethlehem Steel Corp.*, 66 Md. App. 133, 502 A.2d 1101 (1986), cert denied, 306 Md. 289, 508 A.2d 488 (1986); cert denied, ____ U.S. ____, 107 S.Ct. 571 (1986).

[13] *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632 (Tex. Ct. App. 1984), error refused n.r.e., 686 S.W.2d 593 (Tex. 1985).

[14] *Rulon-Miller v. International Business Machine Corp.*, 162 Cal. App. 241, 208 Cal. Rptr. 524 (1984).

[15] *Restatement (Second) of Torts*, § 652D (1977).

[16] *Restatement (Second) of Torts*, § 652D, comment a (1977).

[17] Prosser, § 117 at 810.

[18] Compare *Cronan v. New England Telephone Co.*, No. 80332, 1 IER Cases 651 (Mass. Sup. Ct. 1986), where an invasion of privacy was found, with *Eddy v. Brown*, 715 P.2d 74 (Okla. 1986), where the court found there was not sufficient publicity.

[19] *Restatement (Second) of Torts* § 652E (1977).

[20] Prosser, § 117 at 812.

[21] See, *Restatement (Second) of Torts* § 652E, comment b (1977).

[22] *Ledl v. Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 349 N.W.2d 529 (1984).

[23] Warren and Brandeis at 216.

[24] See Chapter VIII.

[25] Prosser, § 117 at 818; *Schmukler v. Ohio-Bell Tel. Co.*, 116 N.E.2d 819 (Ohio C.P. 1953) (monitoring of telephone calls to ensure proper service); *Thomas v. General Electric Co.*, 207 F. Supp. 792 (W.D. Ky. 1962) (time and motion studies); *City of University Heights v. Conloy*, 20 Ohio Misc. 112, 252 N.E.2d 198 (1969) (spying on suspected thief).

[26] 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

[27] 381 U.S. 479 (1965).

[28] 381 U.S. at 482.

[29] 268 U.S. 510 (1925).

[30] 262 U.S. 390 (1923).

[31] *NAACP v. Alabama*, 357 U.S. 449 (1958).

[32] *Boyd v. United States*, 116 U.S. 616 (1886).

[33] 367 U.S. 643, 656 (1961).

[34] 381 U.S. at 485.

[35] 405 U.S. 438 (1970).

[36] Id. at 453. This line of decisions includes the abortion case, *Roe v. Wade*, 410 U.S. 113 (1973), which extended the right of privacy to a woman's decision to terminate her pregnancy.

[37] 429 U.S. 589 (1977).

[38] Id. at 600.

[39] 392 U.S. 364 (1968).

[40] 466 U.S. 170, 178 (1984).

[41] ____ U.S. ____, 107 S. Ct. 1492 (1987). The text of this decision is included in the appendix.

[42] Id. at ____.

[43] U.S. Const. amend. IV.

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[44] *Ortega*, 107 S.Ct. at 1497, citing, *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

[45] *Ortega*, 107 S.Ct. at 1497.

[46] *Ortega*, 107 S.Ct. at 1505 (Scalia, J., concurring).

[47] *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

[48] See *United States v. Place*, 462 U.S. 696, 703 (1983); *Camera v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

[49] See *United States v. Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973) ("work-related" searches and seizures are reasonable under the Fourth Amendment); *United States v. Collins*, 349 F.2d 863, 868 (2d Cir. 1965), cert. denied, 383 U.S. 960, (1966) (upholding search and seizure of a government agent's office and desk pursuant to "the power of the Government as defendant's employer, to supervise and investigate the performance of his duties as a Customs employee"); *United States v. Bunkers*, 521 F.2d 1217 (9th Cir.), cert. denied, 423 U.S. 989 (1975) (work-related search of a locker tested under "reasonable cause" standard).

[50] *T.L.O.*, 469 U.S. at 351.

[51] *Ortega*, 107 S.Ct. at 1505-1506 (Scalia, J., concurring).

[52] See *In the Matter of Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District*, ____ N.Y.2d ____ (N.Y. Ct. App. June 9, 1987).

[53] Alaska Const. art. I, § 22.

[54] Fla. Const. art. I, § 23.

[55] Cal. Const. art. I, § 1.

[56] See *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829 n.2, 134 Cal. Rptr. 839 (1976).

[57] See Alaska Const. art. I, § 22; Ariz Const. art. II, § 8 (1982) Cal. Const. art. I, § 1 (1972); Fla. Const. art. I, § 23; Haw. Const. art. I, § 6; Ill. Const. art. I, § 6; La. Const. art. I, § 5 (1975) Mont. Const. art. II, § 10; S.C. Const. art. I, § 10 (1971); Wash. Const. art. I, § 7.

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